IN THE UNITED STATES DISTRICT COURT FOR THE

MIDDLE DISTRICT OF ALABAMA

NORTHERN DIVISION

ALABAMA NAACP CONFERENCE OF BRANCHES, et al.,	
Plaintiffs,	
UNITED STATES OF AMERICA,	
Amicus Curiae and Plaintiff,	
v.	C.A. No. 2457-N
GEORGE C. WALLACE, et al.,	
Defendants	

BRIEF OF THE UNITED STATES

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I. Introduction

Act No. 252 of the Alabama legislature, passed and signed into law on September 2, 1966, declares that the Revised Statement of Policies (the HEW "guidelines") issued by the United States Commissioner of Education in March 1966 pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, exceeds the authority granted by the Civil Rights Act, is unconstitutional, and interferes with the public duties of school officials in the State of Alabama. The Act declares that any assurance of compliance with the guidelines given by an Alabama school board is "null and void and shall have no binding effect". Act No. 252, §1. The Act further provides that "No local county or city Board of Education shall have the authority to give any assurance of compliance with the guidelines" or to enter into any other agreement with the United States which would require steps to overcome racial imbalance in the schools or "which would authorize an agent of the United States to take any unlawful action with respect to any employment practice of such board . . . " Id.

The Act creates a Governor's Commission and declares that the Governor and the Governor's Commission shall be jointly responsible for its administration. Act No. 252, §5. Pursuant to the Act, local school boards by majority vote may request that the Governor and the Commission act for it in matters pertaining to federal financial assistance. Act No. 252, §3. Further, funds are authorized and appropriated to be paid out to local school boards to replace some of the funds forfeited by the boards because of their refusal to give or comply with federal assurances or with any other federal requirement which may be declared invalid by the Supreme Court of Alabama. 1/ Funds are also appropriated to cover the reasonable expenses incurred by the Commission in carrying out the purposes of the Act. Act No. 252, §4. The Governor's Commission is given an advisory responsibility in connection with "the peace and order of any school" over and above "the power and authority of the Governor to preserve peace or order". Act No. 252, §7.

1/ The Act excludes from the repayment scheme funds available under the Elementary and Secondary Education Act of 1965.

On September 12, 1966, the NAACP State Conference of Branches and other individual plaintiffs instituted this action for a declaratory judgment invalidating Act No. 252 and for an injunction against its implementation. Their complaint is based upon the due process and equal protection clauses of the Fourteenth Amendment and the impairment of contracts clause of Article I, Section 10 of the United States Constitution. On November 22, 1966 the United States filed a complaint in this action against the Governor and the Governor's Commission in which it sought a declaratory judgment that Act No. 252 is invalid under the supremacy clause of the United States Constitution because it interferes with the lawful federal enforcement of Title VI of the Civil Rights Act of 1964. In their answer to the complaint and in a separate third-party complaint against the Commissioner of Education and the Secretary of Health, Education and welfare, the defendants assert that the guidelines and the HEW regulations issued pursuant to Title VI exceed the authority conferred by Title VI and are repugnant to the Constitution.

This action was heard on November 30, 1966, simultaneously with Lee v. Macon County Board of Education, C.A. No. 604-E (MD Ala.). If we are correct in our claim that the HEW regulation and the Commissioner's guidelines are valid, all issues in this case are resolved except for a determination whether Act No. 252 presents a real enough threat to the enforcement of Title VI to warrant a judicial declaration of invalidity. We treat these two basic points in the following sections of this brief. 2/

2/ On December 29, 1966, the Fifth Circuit decided a group of seven consolidated school cases under the caption of United States v. Jefferson County Board of Education, et al., C.A. 5, No. 23345. In this important opinion, the Court sustained all the provisions of the HEW guidelines and declared them to be the judicial standards school boards would have to meet in the courts of the Fifth Circuit, irrespective of HEW's administrative enforcement of Title VI. Page citations to that opinion are necessarily to the clerk's original copy. The regular slip opinion was not available at the time this brief was prepared.

II. The HEW regulation and the Revised Statement of Policies are valid exercises of authority derived from Title VI of the Civil Rights Act of 1964.

A. The HEW regulation is valid

Section 601 of the Civil Rights Act of 1964, 42 USC §2000d, makes it unlawful to discriminate on the basis of race in the administration of any program receiving federal financial assistance. In Section 602 of the Act, 42 USC §2000d-1, Congress imposed on each federal agency administering federal programs of financial assistance the duty of enforcing the guarantee of section 601 of the Act provides in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 601 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

Pursuant to section 602, the Department of Health, Education and Welfare issued a regulation setting forth the requirements for the receipt of funds under assistance programs administered by the Department. 45 CFR, Part 80. The regulation, in accordance with the requirement of section 602, was approved by the President. 29 F.R. 16298 (1964). The regulation requires that every application for assistance shall "contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part," and that "the responsible Department official shall specify the form of the foregoing assurances for each program. . ." 45 CFR §80.4(a). With respect to continuing State programs, and in anticipation of a period of transition from a status of noncomcompliance to compliance, the regulation requires applicants to state the extent to which they are not in compliance and further requires that their applications "provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part, including methods of administration which give reasonable assurance that any noncompliance indicated in the statement under subparagraph (1) of this paragraph will be corrected." 45 CFR §80.4(b). Regarding public school systems the regulation provides that in the absence of a relevant court order, the school board must submit "a plan for desegregation of such school or school system which the Commissioner of Education determines is adequate to accomplish the purposes of the Act and this part, and provides reasonable assurance that it will carry out such plan. . ." 45 CFR §80.4(c).

Apart from challenging the validity of specific portions of the guidelines, the defendants suggest that the HEW regulation unlawfully delegates to the Commissioner the authority to set substantive standards for school desegregation without the Presidential approval required by §602, and they argue further that the Commissioner may not lawfully defer or seek to terminate funds upon the failure of a school board to file an assurance of compliance with the guidelines or a court-approved desegregation plan. It is the Government's position, on the other hand, that each of these elements in the scheme of Title VI enforcement is an acceptable technique of administrative law and is consistent with the Congressional purpose declared in Title VI.

Section 602 designates each Department head as the promulgator of enforcement regulations. The HEW regulation, as already noted, had to be drafted in terms general enough to cover the fund programs of all sub-agencies in the Department, which administers myriad health, public welfare and social security programs in addition to federal aid to education. The Secretary of Health, Education and Welfare could not in his own regulation describe the detailed standards each recipient of funds from the Department would have to meet. Determination of particular standards was, with the required approval of the President, delegated to the sub-agency heads,[3/] although formal termination of course is not left to the subordinate administrators.

The courts have long since adjusted to the complexity of federal administration and the necessity of delegation by top-level executive officials of their power to establish particular standards under a general grant of regulatory authority. In this connection, the Fifth Circuit has said:

> The express provisions aside, we think it is too clear for debate that Congress in conferring the powers in question, did not expect or intend that the President should in person execute all the vast duties imposed upon him, and that if there

3/ 45CFR §80. 4(b)(2). This section applies only to continuing programs operated by a State agency.

> had been no express authority to act by deputies, that authority would have been implied. The long and unbroken history of our government presents not a few, but a multitude of, instances where powers, the nature of which are such that they are impossible of personal execution, have been delegated to an office or a department. In all of those cases, the established practice has been that the duties so delegated are performed by the many persons the delegate has selected to perform them (emphasis added). [Shreveport Engraving Co. v. United States, 143 F. 2d 222, 226 (C.A. 5, 1944), cert. denied, 323 U.S. 749].

The necessity for delegation of its own force supports a subdelegation of administrative authority. "The same principles which will admit of delegation in any case may suffice to justify a redelegation or subdelegation." Shreveport Engraving Co. v. United States, supra, at 228; Savoretti v. Small, 244 F. 2d 292, 297 (C.A. 5, 1957). See 1 Davis, Administrative Law §9.05 (1958). In view of the enormous variety and volume of fund programs administered by HEW, and the expertise needed to administer each one efficiently, it would require the clearest Congressional negation of authority to support a conclusion that, pursuant to §602, the Secretary of HEW could not delegate to the Commissioner the burden of establishing particular standards which in the Commissioner's judgment school boards would have to meet to bring themselves into compliance with the general requirements of Title VI.

B. HEW may lawfully require assurances of compliance from applicants for federal assistance

The defendants argue that there is no relationship between the requirement in the HEW regulation of an assurance of compliance, 45 C.F.R. §80.4(a), and the discrimination forbidden by §601 of the Act, and they conclude that the statute does not authorize deferral of action or termination of funds upon the failure of a school board to file the required assurance. 4/ The test under §602 is whether the regulation is calculated "to effectuate the provisions of section 601" and is "consistent with achievement of the objectives of the

4/ Deferral of action is an interim process invoked by the Commissioner while a potential recipient is under investigation, and the deferral applies only to programs under which the applicant is not yet receiving funds -- that is, the applicant continues to receive funds for which it has already become eligible. Dep. of Howe at 75-76. Termination proceedings in accordance with §602 of the Act lead to a denial of funds already committed. Although we think it plain that the authority to defer funds pending a final decision is inherent in Title VI itself, the Fountain Amendment adopted as part of Public Law 750 (89th Cong., 2nd sess.) and signed into law on November 3, 1966, makes the power to defer explicit. The statute reads (P.L. 89-750, 80 Stat. 1209):

> The Commissioner of Education shall not defer action or order action deferred on any application by a local educational agency for funds authorized to be appropriated by this Act, by the Elementary and Secondary Education Act of 1965, by the Act of September 30, 1950 (Public Law 874, Eighty-first Congress), by the Act of September 23, 1950 (Public Law 815, Eighty-first Congress), or by the Cooperative Research Act, on the basis of alleged noncompliance with the provisions of title VI of the Civil Rights Act of 1964 for more than sixty days after notice is given to such local agency of the opportunity for a hearing as provided in section 602 of title VI of the Civil Rights Act of 1964, such hearing to be held within sixty days of such notice, unless the time for such hearing is extended by mutual consent of such local agency and the Commissioner, and such deferral shall not continue for more than thirty days after the close of any such hearing that such local educational agency has failed to comply with the provisions of title VI of the Civil Rights Act of 1964.

statute authorizing the financial assistance in connection with which the action is taken." It is difficult to see how the assurance requirement could be inconsistent with any of the objectives of the many statutes authorizing federal aid to public schools. None of those statutes contemplate unequal or discriminatory treatment of students and none guarantee to recipients the automatic right to receive funds irrespective of general procedural requirements imposed by the Office of Education.

The Office of Education is the conduit of many billions of dollars to many thousands of school boards each year. The efficient conduct of its programs by the Commissioner requires the use of administrative devices which will facilitiate control of the programs and will enable the Commissioner to meet the obligations imposed upon him by statute, including Title VI. There is no way the Commissioner and his staff can investigate every recipient school system before authorizing funds to make certain the school system is in compliance with Title VI, the HEW regulation, and the guidelines. For the Commissioner, as for other agency heads in HEW operating under the general regulation, the assurance is an indispensable contact with each local school system. It is a formal means by which applicants for funds inform the Commissioner that they know of the conditions for the receipt of funds and that they have decided to meet those conditions. In the absence of the assurance, the Commissioner would have to release funds on the mere hope that recipients will comply with federal requirements, for he is without the means of investigating compliance beforehand. The assurance, apart from whether it is judicially enforceable, is a technique of administrative inquiry, and as such should be given free rein by the courts. In FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-143 (1940), the Supreme Court in speaking of the freedom of procedural action administrative agencies should enjoy, said:

> Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. . . . [Agencies] should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their mutitudinous duties.

What the Court said of the power the Federal Communications Commission in FCC v. WJR, 337 U.S. 265, 282 (1949) equally applies to the broad grant of rule-making authority conferred by §602:

> . . . Congress was mindful not only of the ends of justice but also of the proper dispatch of the Commission's business, a matter not unrelated to achieving the ends of justice, and left largely to its judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate those ends.

See also FCC v. Schreiber, 381 U.S. 279 (1965).

Congress understood that non-discrimination assurances would be one device employed by federal agencies under the rule-making power conferred by §602. Senator Pastore, floor manager for Title VI, declared [110 Cong. Rec. 7059 (1964)]:

> The rule or regulation issued by the particular Federal agency would vary, depending on the nature and method of administration of the particular assistance program. There might be rules, for example, governing the conduct of recipients of assistance, or orders specifying a standard form of written assurance or understanding to be given by each applicant for assistance, or perhaps a standard provision-of-assistance contract.

Senator Ribicoff added [Id. at 7066]:

> For example, the most effective way for an agency to proceed [under Title VI] would often be to adopt a rule that made the nondiscrimination requirement part of a contractual obligation on the part of the recipient. Then violation of such a requirement would normally give the agency the right to bring a lawsuit to enforce its own contract.

Apart from specific Congressional references to assurances included in contracts or otherwise required of applicants, Congress intended generally that each agency be the judge of the means by which its duty under §602 would be met. The substantially unqualified rule-making power conferred by the statute makes this clear, and Senator Pastore emphasized the point in the course of the Senate debate (Id. at 7058):

> Action is mandatory, but the procedure by which that action is accomplished is discretionary subject, however, to the approval of the President.

Nothing in the record in this case or in the HEW regulation itself suggests that the Secretary or his subordinates have used their discretion arbitrarily or without regard to the objectives both of Title VI or the statutes granting federal funds to public school systems.

C. The Guidelines are valid

Under the HEW regulation each responsible Department official is obliged to "provide assistance and guidance to recipients to help them comply voluntarily with this part." 45 CFR §80.6(a). The Regulation thus contemplates administration of financial assistance to public school systems by the Commissioner of Education through his separate determinations that individual school boards have met or are preparing to meet the requirements of section 601 as they apply to public school systems. Although the techniques of administration is left to the Commissioner, he is directed to provide guidance to potential recipients, and the Revised Statement of Policies, which is the subject of the Alabama statute challenged in this case, is the Commissioner's effort to provide that guidance.

The revised statement is not a substantive regulation which of itself requires particular affirmative action; therefore it does not require the approval by the President contemplated by section 602 for the general regulation. 5/ The regulation upon approval assumes the status of law, see Public Utilities Commission

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5/ The Commissioner does not expect, nor could he, that hearing examiners at fund termination proceedings would consider themselves bound by the guidelines. Dep. of Howe at 174. "The Guidelines do not purport to be a rule or regulation or order. They constitute a statement of policy under paragraph 80.4(c) of the HEW Regulations issued after the President approved the regulations December 3, 1964." United States et al. v. Jefferson County Board of Education, et al., (No. 23345, C.A. 5, December 29, 1966) slip opinion at 13.

v. United States, 355 U.S. 534 (1958); Paul v. United States, 371 U.S. 245 (1963), while the revised statement, although given actual effect by the Commissioner on a case-to-case basis, is simply the Commissioner's announcement regarding the standards and conditions individual school boards must meet to enable him to determine, in accordance with the regulation, that their "methods of administration. . . will comply with all requirements imposed by or pursuant to this part." 45 CFR §80.4(b).[6]

In formulating the revised statement, the Commissioner, of course, had to be guided by the admonition of section 602 that the regulations it authorizes, and a fortiori the administrative standards they in turn authorize, "shall be consistent with achievement of the objectives" of section 601. He is specifically authorized to make judgments regarding the "methods of administration" of a local school system which will accomplish compliance with section 601 and the regulation, and he may require school boards to identify their methods of administration so that he may determine whether they are entitled to financial assistance. The Revised Statement of Policies accomplishes these ends and does no more.

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6 / The particular language of the regulation contemplates the setting of substantive standards by administrators beyond those contained in the regulation itself. Sections 80.4(a) and (b) both refer to compliance "with all requirements imposed by or pursuant to this part" (emphasis added), implying a designation of requirements by an authority outside of the regulation itself.

In United States v. Jefferson County Board of Education, et al. (C.A. 5, No. 23345, opinion dated December 29, 1966) the Fifth Circuit examined the relationship between constitutional requirements and the HEW guidelines and concluded that there was a substantial identity between the two. The Court said (slip opinion at 3):

> [W]e hold that HEW's standards are substantially the same as this Court's standards. They are required by the Constitution and, as we construe them, are within the scope of the Civil Rights Act of 1964.

Notwithstanding this recent and authoritative judicial approval of the revised statement, we think it useful to describe the guidelines in some detail and to answer in light of the record in this case the specific objections to them raised by the defendants.

The revised statement, 45 CFR, Part 181, contains three major substantive sections -- one setting forth basic requirements for all voluntary desegregation plans, and two others which alternatively provide specific standards for plans based on geographic attendance zones and plans based on free choice of schools. 45 CFR, Part 181, Subparts B, C, and D. The standards of administration they announce are either derived from settled judicial requirements for desegregation or are so clearly related to the accomplishment of desegregation that there can be no question of their validity under section 601 and the implementing regulation.7/

7/ "The HEW Guidelines agree with decisions of this circuit and of the similarly situated Fourth Eighth Circuits. And they stay within the Congressional mandate." United States v. Jefferson County Board of Education, supra, at 44 (emphasis in the original).

The basic requirements applicable to all plans require unqualified nondiscrimination in use of tests and other criteria for assignment of students to classes or schools. 45 CFR §181.12. Further, the Commissioner will consider the racial composition of the school staff in determining whether students are subjected to discrimination. The schools are required to hire new personnel without regard to race, and to make personnel assignments that will eliminate past patterns of segregation. 45 CFR §181.13. The statement suggests certain specific steps a school system might take to initiate staff desegregation, 45 CFR §181.13(d), none of which are in terms made obligatory. All services, activities, and programs must be desegregated, including athletics, transportation, and special educational programs. 45 CFR §181.14. Further, a system normally would be expected to close facilities originally designed for use by Negroes and which are inadequate and inferior to facilities available for whites. 45 CFR §181.15. School officials must publicize and seek community support for their desegregation plans and must protect or seek protection for persons exercising rights under the plans. 45 CFR §181.14(c).

The specific standards for school boards choosing a geographic attendance zone plan require that zone boundaries of the single system may not be designed to perpetuate or promote segregation (45 CFR §181.32) and that students must be assigned to schools in the zones where they live unless the special educational needs of the student require another assignment or the student, upon permission by the school board, chooses to transfer to a school where is own race is in the minority from one where he is in the majority (45 CFR §181.33).

The standards required of free choice plans do not vary from those generally required by the Fifth Circuit in its recent school desegregation decisions, and include the mandatory exercise of choice by all students each year (45 CFR §181.44); 8/ full and thorough notice to students and parents without the imposition of technical requirements regarding form (45 CFR §181.46); 9/ and assignment according to choice except in the case of overcrowding, in which case preference must be given only on the basis of residential proximity to the school (45 CFR §181.49). 10/ Preferences based upon prior attendance at a school may be given only for specified reasons brought to the attention of the Commissioner (Ibid.) School officials must endeavor to obtain choices from all students, but may not seek to influence students or parents regarding their choices (45 CFR §181.52).

8/ See Singleton v. Jackson Municipal Separate School District, 355 F. 2d 865 (C.A. 5, 1966).

9/ Armstrong v. Board of Education of City of Birmingham, 333 F. 2d 47, 52 (C.A. 5, 1964); Calhoun v. Latimer, 321 F. 2d 302 (C.A. 5, 1963).

10/ See Davis v. Board of School Commissioners of Mobile County, 364 F. 2d 896, 904 (C.A. 5, 1966); Gaines v. Dougherty County Board of Education, 329 F. 2d 823, 825 (C.A. 5, 1963).

The revised statement recognizes that free choice plans will of their nature operate against long-standing custom and community pressures. 45 CFR §181.54. It announces that the Commissioner will scrutinize the operation of such plans to determine whether they are operating effectively, taking as the single most significant indication of effectiveness the number of Negro students actually in attendance at formerly all-white schools. Ibid. Where the number of Negroes transferring is less than would normally be expected and little or no faculty desegregation has occurred, the Commissioner may require some further action by school officials. 11/ As guideposts to determine the scheduling of free choice plans for review, the statement sets out statistical criteria suggesting

11/ See Dep. of Howe at 83-84. Similarly, the Fifth Circuit concluded that a plan was defective principally because of the low number of Negro transfers under it. In Davis v. Board of School Commissioners of Mobile County, 364 F.2d 896, 901 (C.A. 5, 1966), the Court said: ". . . [W]e conclude that the Moible plan falls far short of the requirements of the law in several respects. Principal among these is the fact that even as to those grades which, under the plan, have actually become 'desegregated' there is no true substance in the alleged desegregation. Less than two-tenths of one percent of the Negro children in the system are attending white schools."

the expected increase in Negro transferees relative to the number of transferees in the preceding year.12/ Where the expected increases do not materialize the Commissioner may determine from this and other evidence that the plan is not working fairly, and may require additional steps to promote the exercise of free choice. He may also require adoption of a different kind of plan if adjustments cannot be expected that will correct the deficiencies in the free choice plan. Id.

12/ "Common sense suggests that a gross discrepancy between the ratio of Negroes to white children in a school and the HEW percentage guides raises an inference that the school plan is not working as it should in providing a unitary, integrated system." United States v. Jefferson County Board of Education, supra, at 45.

D. <u>The Commissioner may require faculty desegregation</u>

None of the standards of the revised statement require school boards to take action not positively required by the Fourteenth Amendment and therefore by section 601, or which could not properly be required of them by a court implementing the equal protection clause. It is plain, for example, that teacher desegregation is an integral part of any desegregation plan, not because teachers have employment rights *vis-a-vis* the school board, but because students are entitled to a non-racial education, and assignment of teachers to students on the basis of race denies them that right. See *Bradley* v. *School Board of Richmond*, 382 U.S. 103 (1965); *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Davis* v. *Board of School Commissioners of Mobile County*, 364 F. 2d 896 (C.A. 5, 1966); *Singleton* v. *Jackson Municipal Separate School District*, 355 F. 2d. 865 (C.A. 5, 1966); *Wheeler v. Durham City Board of Education*, 363 F. 2d 738 (C.A. 4, 1966); *Kemp* v. *Beasley*, 352 F. 2d 14 (C.A. 8, 1965). The very recent decision in *Clark* v. *Board of Education of the Little Rock School District*, C.A. 8 (No. 18, 368, opinion dated December 15, 1966) requires that specific and far-reaching steps must be taken now to end faculty segregation. The Court said (slip opinion at 13):

> We agree that faculty segregation encourages pupil segregation and is detrimental to achieving a constitutionally required non-racially operated school system. It is clear that the Board may not continue to operate a segregated teaching staff. . . . At this point the Board is going to have to take accelerated and positive action to end discriminatory practices in staff assignment and recruitment.

Defendants argue that insofar as the Commissioner requires faculty desegregation in his administration of Title VI, his action is contrary to section 604 of the Act, 42 U.S.C. §2000d-3, which provides as follows:

> Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Concededly, segregation of faculty is an employment practice vis-a-vis the teachers, but with respect to students it is an educational practice incompatible with a program of compliance with the equal protection clause and Title VI. See Rogers v. Paul, 382 U.S. 198, 200 (1965). Since §601 confers on students a right to a nondiscriminatory education in school systems receiving federal assistance, see Lemon v. Bossier Parish School Board, 240 F. Supp. 709 (W.D. La. 1965), the government's duty under §602 to enforce that right requires that it deal with all aspects of a school system involving discrimination that bear upon the students. Moreover, it is naive to label faculty segregation as an employment practice and nothing more, when historically it has been one of the most obvious manifestations of a segregated system. That faculty segregation is, among other things, an employment practice is no warrant for bringing the practice within the immunity of §604. This question has now been settled by the decision in United States v. Jefferson County Board of Education, supra, where the court ruled:

> . . . [U]nder Section 601 it is the school children, not the teachers (employees), who are the primary beneficiaries of federal assistance to public schools. Faculty integration is essential to student desegregation. To the extent that teacher discrimination jeopardizes the success of desegregation, it is unlawful wholly aside from its effect upon individual teachers. [Slip opinion at 39].

There is compelling evidence that Congress did not intend that §604 would have the impact attributed to it by the defendants. Senator Humphrey, the principal administration spokesman for the Civil Rights Act of 1964, made the following reference to the Commissioner's responsibility regarding faculty desegregation [110 Cong. Rec. 6545 (1964)]:

> It is not expected that funds would be cut off so long as reasonable steps were being taken in good faith to end unconstitutional segregation.
>
> In such cases, the Commissioner might also be justified in requiring elimination of racial discrimination in employment or assignment of teachers, at least where such discrimination affected the educational opportunities of children.

When the Senate leadership proposed a substitute bill which contained the present §604, Senator Humphrey stated that §604 "is in line with the provisions of §602 and serves to spell out more precisely the declared scope of coverage of the title." 110 Cong. Rec. 12720.

There is no basis in the sparse legislative history of §604 for concluding that it was intended to change the particular meaning of §601 that had been elucidated by Senator Humphrey with respect to schools when Title VI first came before the Senate. Moreover, since the courts have now established that faculty desegregation is an essential element in the elimination of a dual system, a construction of Title VI which would inhibit administrative implementation of that requirement would render Title VI enforcement something less than a fully effective instrument for protection of the rights declared by §601. Congress surely did not intend that the Commissioner of Education should be forbidden from acting against a practice which the courts have ruled unlawfully discriminates against theprimary beneficiaries of federal aid to education -- namely, the students.13/

13/ Early objections to Title VI expressed the fear that private recipients of federal assistance, such as farmers, would be compelled to hire Negroes simply because they accepted the assistance. See, e.g., House Report No. 914 at 69 (88th Cong., 1st sess., minority views). Since it was never intended that Title VI should affect the employment practices of the ultimate individual beneficiaries of federal programs, §604 was added to make this construction explicit. United States v. Jefferson County Board of Education, supra, at 40.

The Commissioner does not require action to overcome "racial imbalance."

The revised statement imposes no standards which would require, to borrow the language of section 401 of the 1964 Act, 42 U.S.C. §2000c(b), "the assignment of students to public schools in order to overcome racial imbalance." Assuming that the definition of desegregation in section 401 to exclude the correction of racial imbalance signifies the policy embodied in Title VI, there is nothing in the revised statement contrary to that policy.14/ The Commissioner has settled upon stated percentage increases in the numbers of Negroes attending formerly all white schools as a guide to him in selecting those free-choice plans which his office will most carefully review. 45 CFR §181.54. The percentage increases that the Commissioner uses as warning signals calling for closer observation of a plan in operation are predicated on very low initial transfers by Negroes; for example, transfers by 8 or 9 per cent of the Negroes in a system in 1965-66 is considered a

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14/ "But there is nothing in the language of the Act or in the legislative history that equates corrective acts to desegregate or to integrate a dual system initially based on de jure segregation with acts to bring about a racial balance in a system based on bona fide neighborhood schools." United States v. Jefferson County Board of Education at 43(a) (emphasis in the original).

"significant percentage of the students." *Ibid.* Thus, the function of the percentages is to identify those systems in which legally required desegregation might not be taking place effectively. The percentages impose no compulsory transfer requirements. Their principal impact is to establish an internal procedure by which matters will be assigned for administrative review, and by announcing them, the Commissioner is alerting the school boards as to when they may expect close scrutiny. No action can be taken on the basis of the percentages; the statement declares, regarding the percentages, that "where there is substantial deviation from these expectations, and the Commissioner concludes, on the basis of the choices actually made and other available evidence, that the plan is not operating fairly, or is not effective to meet constitutional and statutory requirements, he will require the school system to take additional steps to further desegregation." *Ibid.* In the absence of a specific determination by the Commissioner based upon evidence peculiar to a given school system that its desegregation plan simply is not working, the percentages contained in the statement are given no administrative effect.15/

15/ See Dep. of Howe at 84, 88-89.

The evidence in this case refutes the defendants' claim that the Commissioner rejects assurances and defers funds merely upon application of a statistical test based upon percentages of Negro transferees. It does show that when a school district operating under a voluntary free-choice plan takes no steps to desegregate its faculty and an unexpectedly low number of Negro students have transferred to white schools, that combination of factors may induce the Commissioner to defer an application for new funds until further investigation reveals whether on some other basis there is substantial compliance with §601 and the equal protection clause.16/ Since both of these factors are judicially taken to be evidence of an inadequate desegregation plan, Davis v. Board of School Commissioners of Mobile County, supra, the Commissioner is justified in treating them the same way.

The defendants in their pre-trial memorandum have entirely misrepresented the content of the revised statement. They wrongly assert (Dfts. Pre-Trial Memoranda at 5-6) that the Commissioner will require further action under a free-choice plan if the expected percentages of transfers set forth in the guidelines (42 CFR §181.54) are not realized. As explained above, and as the evidence in this case shows, the guidelines suggest no such requirement

16/ See Dep. of Howe at 84-89.

and none is imposed by the Commissioner. The Fifth Circuit in United States v. Jefferson County Board of Education, supra, stated in this connection:

> There is no cross-district or cross-town bussing requirement. There is no provision requiring school authorities to place white children in Negro schools and Negro children in white schools for the purpose of striking a racial balance in a school or school district proportionate to the racial population of the community or school district. The provision referring to percentages is a general rule of thumb or objective administrative guide for measuring progress in desegregation rather than a firm requirement that must be met. (Slip opinion at 44.)

Defendants further assert that the guidelines require bussing to overcome "racial imbalance", 17/ citing §§181.14, 181.49, and 181.51. Section 181.14, applicable to all types of desegregation programs, requires that "routes and schedules must be changed" so as to eliminate "dual or segregated transportation systems." The requirement has nothing to do with

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17/ The term "racial imbalance" refers to the situation where geographic assignment compels Negroes to attend predominently Negro schools in which the proportion of Negro pupils exceeds the proportion of Negroes at the same grade level in the community. See Fiss, Racial Imbalance in the Public Schools: The Constitutional Concepts, 78 Harv. L.R. 564 (1965). Its legal implications, quite different from those relating to systems founded on racial assignments, are treated in Dennis v. Kansas City, 336 F. 2d 988 (C.A. 10, 1964); Bell v. School City of Gary, Indiana, 324 F. 2d 209 (C.A. 8, 1963); and Springfield School Commission v. Barksdale, 348 F. 2d 261 (C.A. 1, 1965).

racial imbalance. It means that one system of busses for Negroes and another for whites is unacceptable and that no student shall be assigned to a particular bus because of his race or color. A common practice in systems operating on free-choice plans is to bus the Negro students attending predominantly white schools in special busses for Negroes only, while busses for white students going to the same schools pass by or through the Negro neighborhoods. Sections 181.14 prohibits that kind of practice. Sections 181.49 and 181.51 apply only to free-choice plans and they prohibit denial of a student's choice on any ground other than overcrowding. Section 181.51 specifically excludes transportation difficulties as a basis for denying a choice.[18/]

Regarding these objections, we note first that the Fifth Circuit has held that overcrowding is the only acceptable basis for denial of a free choice, Davis v. Board of School Commissioners of Mobile County, supra. Further, the guidelines provisions to which the defendants most forcefully object apply whenever a school board chooses to desegregate by means of a free-choice plan. Because under a free-choice plan the

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18/ Section 407(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000c-6(a), disclaims authorization for any court order "seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance. . . ." Regarding this provision, Judge Wisdom in United States v. Jefferson County Board of Education, supra, stated (slip opinion at 35): "The furnishing of transportation as part of a free choice plan is not prohibited."

school board abdicates school assignments to the whim of students, the Fifth Circuit has noted that: "In the long run, it is hardly possible that schools will be administered on any such haphazard basis." Singleton v. Jackson Municipal Separate School District. 355 F. 2d 865, 871 (C.A. 5, 1966). See also Clark v. Board of Education of the Little Rock School District, supra. The guidelines provisions regarding transportation are designed to insure that the school system accomodates its transportation program to the choices it has decided to allow the students to make. They require only that if the school a student chooses or is otherwise assigned to because of his choice is sufficiently far from his home to entitle him to transportation under the system's generally applicable rules, he must be given that transportation. 45 CFR §181.51.

III. <u>Act No. 252 conflicts with Title VI and interferes with the enforcement of HEW regulations and is therefore invalid under the Supremacy Clause</u>.

The basic claim of the United States in this case is that Act No. 252 has the effect of deterring and interfering with efforts of local school boards in Alabama to give and then abide by assurances that they will administer federal assistance programs in compliance with §601 of the Civil Rights Act of 1964 and regulations issued pursuant to §602 of the Act. It is our position that Act No. 252 is in direct conflict with Title VI and should be declared invalid by this Court under the supremacy clause.

The conflict between the terms and the administration of Title VI on the one hand and Act No. 252 is not speculative or conjectural; it is plain from the face of the statute and it is proven by the evidence in this case. First, Act No. 252 declares null and void the assurances already given to HEW by school boards that they will comply with Title VI, the Department's regulations, and their own desegregation plans. The statute goes further and restricts the authority of school boards to give such assurances in the future, although it in no way restricts their authority to receive federal funds or conduct the programs for which federal assistance is available.

The effect of Act No. 252 upon the conduct of individual school boards in Alabama may also be determined from an analysis of the powers the statute reposes in the defendants set against the defendant's conduct <u>vis-a-vis</u> the school boards both before and after the Act was passed. In the summer of 1965 the defendants began an all-out assault upon the efforts of local school boards to comply with Title VI and the related administrative regulations. For example, in August, 1965, the Governor and other officials informed many school boards that their plans went beyond the Commissioner's minimum requirements and said: "We think it would be advisable for your school board to reconsider your action in the submission of your compliance plan."19/ The Superintendent of Lauderdale County was informed by the Governor that his plan to eventually eliminate all-Negro schools and transfer the pupils to white schools "could do more to destroy the public educational system of Alabama than any action since the infamous 1954 decision of the United States Supreme Court . . . . We call upon you to align your policies with the minimum requirements of the law and of court orders."20/ The Governor's legal adviser told the Sheffield district superintendent that he should "consider recalling its plan and agreement from the Office of Education."21/

Throughout the 1965-1966 school year the defendants maintained periodic contact with local school officials on the subject of HEW compliance plans.22/ In May 1966 the defendant Meadows recommended to several school

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19/ Govt. Exs. 6, 7, 8, 9, 10 and 11.

20/ Govt. Ex. 2.

21/ Brewster Dep. at 24.

22/ Govt. Exs. 5, 10, 14, 15, 22-25, 26.

boards that they do nothing to integrate their faculties and that they reconsider their assurances of compliance with the guidelines.[23/] Repeated efforts were made by the defendants, by asserting their statutory authority to supervise public education in Alabama, to compel school boards to resist federal enforcement of Title VI.[24/] At times cooperation with state officials was tied to the receipt of state funds.[25/]

It was in this climate of state-local relations that the legislature adopted Act No. 252. Substantively, the Act declares null and void assurances given by local school boards to the Office of Education and forbids them from given further assurances in the future. The Governor was designated the principal enforcer of the statute. Thus the Governor's prior conduct regarding the guidelines was given new stature that had an intimidatory effect upon local school officials. Act No. 252 unmistakably made the Governor the last official word on Title VI in Alabama, rendering each local school official subservient to his judgment and his demands in a way that might not have been clear prior to its adoption.

23/ Govt. Ex. 27-32.

24/ See, *e.g.*, Govt. Ex. 38-57; 62-65.

25/ Govt. Exs. 11, 66, 67.

Soon after the adoption of Act No. 252 the defendant Meadows invoked its authority to request of the Tuscaloosa School Board, in the name of the public policy of the State, that it reassign Negro teachers back to all-Negro schools. The defendants embarked upon a pattern of conduct that made attempted compliance with the guidelines, particularly on faculty desegregation, an act of consummate political courage. One local official said compliance would "be breaking the law," another said that he was "not man enough" to comply.[26] Going further, the defendant Meadows invoking the authority of state policy and with the approval of Governor Wallace established a program of state allocation of extra teacher units so that white students would have a choice of white and Negro teachers wherever a Negro teacher was assigned to a white school.[27]

The sum of this state-level effort, both before and after passage of Act No. 252, was to deny to local school boards any freedom of action to deal with HEW and obtain federal assistance upon the terms properly required by federal law. This effect is apart from, but magnifies, whatever negative judgments local officials might have come to regarding their assurances by reason of the negation of these assurances by Act No. 252.

26/ Govt. Ex. 2, telephone calls of Pickens County Superintendent to Mr. Burns of HEW and Lee County Superintendent to Mr. Fairley of HEW.

27/ Govt. Ex. 97.

A state may not adopt a public policy of non-compliance with Federal law. It may not interfere with those persons, whether public officials or otherwise, who are properly obligated to the federal government to take certain action. Federal funds must be disbursed upon conditions lawfully established by federal authorities, and not upon conditions deemed proper by state authorities. When a State interferes with the operation of Federal law upon an incorrect view of the legality of that law, it brings itself directly into unlawful conflict with the federal law by reason of the Supremacy Clause. This concept was articulated in United States v. Allegheny County, 322 U.S. 174,183 (1944), as follows:

> . . . [P]olicies so settled under federal law may not be defeated or limited by State law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls.

In United States v. Georgia Public Service Commission, 371 U.S. 285, 293, (1963), the Court reiterated that "a State is without power by reason of the Supremacy Clause to provide the conditions on which the Federal Government will effectuate its policies."

In Act No. 252, Alabama has attempted to establish the conditions upon which federal funds shall be received by public school systems in the State, and the defendants have sought to implement the policy of the statute. Moreover, the statute legitimates a state policy of pervasive hostility and opposition to federal action under Title VI that had been impressed upon school officials by the defendants even prior to its adoption. In this setting and upon the evidence presented in this case, Act No. 252 should be declared unconstitutional. Such a declaration is necessary to remove any doubt harbored by local officials that they may ignore assurances already given to HEW or should refuse to give them in the future.

Respectfully submitted,

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